

1 Jesse J. Maddox, Bar No. 219091  
jmaddox@lcwlegal.com  
2 David A. Urban, Bar No. 159633  
durban@lcwlegal.com  
3 Olga Y. Bryan, Bar No. 298969  
obryan@lcwlegal.com  
4 Morgan Johnson, Bar No. 345620  
mjohnson@lcwlegal.com  
5 LIEBERT CASSIDY WHITMORE  
A Professional Law Corporation  
6 5250 North Palm Ave, Suite 310  
Fresno, California 93704  
7 Telephone: 559.256.7800  
Facsimile: 559.449.4535  
8

9 Attorneys for Defendants STEVE WATKIN in his official capacity  
as Interim President, Bakersfield College; et al.

10  
11 UNITED STATES DISTRICT COURT

12 EASTERN DISTRICT OF CALIFORNIA - BAKERSFIELD

13 DAYMON JOHNSON,

14 Plaintiff,

15 v.

16 STEVE WATKIN, in his official  
capacity as Interim President, Bakersfield  
17 College; et al.,

18 Defendants.  
19

Case No.: 1:23-cv-00848 KES-CDB

Complaint Filed: June 1, 2023  
FAC Filed: July 6, 2023

**THE DISTRICT DEFENDANTS'  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN OPPOSITION TO  
PLAINTIFF'S MOTION FOR  
ADMINISTRATIVE RELIEF**

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 By this Motion, Plaintiff Daymon Johnson (“Plaintiff”) seeks to have this Court expedite  
4 its ruling on the Motion for Preliminary Injunction. The District Defendants<sup>1</sup> oppose the Motion  
5 to the extent there are pending motions to dismiss by Defendants under Federal Rule of Civil  
6 Procedure 12(b)(6) as to all claims in Plaintiff’s First Amended Complaint. Preliminary  
7 injunctive relief would be improper before those motions are decided. *See W.C. v. Rowland*  
8 *Unified Sch. Dist.*, 2017 WL 11509987, at \*1 (C.D. Cal. June 15, 2017) (vacating preliminary  
9 injunction hearing based on dismissal of underlying complaint).

10 The District Defendants also oppose the instant Motion because no reason exists on the  
11 merits to expedite the decision on Plaintiff’s request for a preliminary injunction. The passage of  
12 many months since Plaintiff filed the Motion, and corresponding altered circumstances, requires  
13 that the request be denied. This has been the case for some time, and this Court deciding this  
14 Motion now – or months from now – will make no difference. Plaintiff’s Motion was filed on a  
15 rush basis in July 2023 to block implementation of the State’s Diversity Equity Inclusion and  
16 Accessibility (“DEIA”) regulations that would be effective in Fall 2023. It is now Spring of  
17 2024, and those regulations have been implemented statewide for an entire academic year. There  
18 is no longer any exigency whatsoever to justify preliminary injunctive relief. This is not the fault  
19 of this Court, but of the unique circumstances that exist in the Eastern District of California,  
20 including a long period in which the Court had no choice but to assign “No Judge” to the instant  
21 case.

22 Even absent these circumstances, delay in any ruling in fall and winter of 2023 (necessary  
23 in any judicial process) was fatal to Plaintiff’s preliminary injunction request, since the academic  
24 year was already well under way by the time the Magistrate Judge had ruled on the preliminary  
25 injunction request, and the parties had submitted their respective Objections to it. At the New  
26 Year of 2024, the DEIA regulations had already been in effect for months. This Administrative

27 <sup>1</sup> As described previously, the District Defendants include the following sued in their official  
28 capacities: Steve Watkin, Richard McCrow, Thomas Burke, Romeo Agbalog, John S. Corkins,  
Kay S. Meek, Kyle Carter, Christina Scrivner, Nan Gomez Heitzeberg, and Yovani Jimenez.

1 Motion should be denied, because it is clear by now that the preliminary injunction request by  
2 Plaintiff should be denied.

3 **II. THE PRELIMINARY INJUNCTION REQUEST HERE HAS BECOME STALE**  
4 **AND SHOULD BE DENIED**

5 A plaintiff seeking a preliminary injunction must establish that: (1) they are likely to  
6 succeed on the merits, (2) they are likely to suffer irreparable harm in the absence of preliminary  
7 relief, (3) the balance of equities tips in their favor, and (4) an injunction is in the public interest.  
8 *Winter v. Natural Resources Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The District Defendants  
9 have addressed these elements in their Objections to the Magistrate Judge’s recommended ruling,  
10 but the passage of many months since that briefing in fall and winter 2023 has now made it so  
11 that the factors listed above tilt even further against preliminary injunctive relief. A preliminary  
12 injunction would come too late to stop what Plaintiff contends would constitute “irreparable  
13 harm,” and the balance of equities clearly disfavors halting (particularly District-wide or state-  
14 wide) a process the District Defendants were required to implement by state law. Similarly, the  
15 public interest decisively precludes ruling on a preliminary injunction motion almost a year after  
16 it is filed, when the evidence and argument are stale. Any alleged irreparable harm would have  
17 already occurred (and has not), and a “preliminary” injunction is not the remedy to stop such  
18 speculative harm in the future.

19 With implementation of the State’s DEIA regulations taking place all across the state, and  
20 subject to implementation for many months, issuance of a preliminary injunction now would not  
21 maintain the status quo – it would instead completely upend it. “Mandatory preliminary relief,  
22 which goes well beyond simply maintaining the status quo pendente lite, is particularly  
23 disfavored, and should not be issued unless the facts and law clearly favor the moving party.”  
24 *Anderson v. U.S.*, 612 F.2d 1112, 1114 (9th Cir. 1979) (quoting *Martinez v. Mathews*, 544 F.2d  
25 1233, 1243 (5th Cir. 1976)). Plaintiff here is not entitled to the “extraordinary” remedy of a  
26 preliminary injunction under these circumstances. *See Winter*, 555 U.S. at 31 (“A preliminary  
27 injunction is an extraordinary remedy never awarded as of right.”). Courts acknowledge that the  
28 passage of time can require denial of a pending preliminary injunction request. *See Josephine*

1 *Cty. v. Watt*, 539 F. Supp. 696, 707 (N.D. Cal. 1982) (acknowledging how delay affects a court's  
2 ability to decide on a preliminary injunction; "The Court is aware that the combination of the  
3 press of business of this Court and the prolixity of the documents filed in connection with this  
4 motion have held this matter under submission for an extensive period of time" and "[a]s a result,  
5 some affidavits may be stale and outdated."); *CFTC v. Monex Credit Co.*, 2020 U.S. Dist. LEXIS  
6 221777, \*9-10 (C.D. Cal. 2020) (the long pendency of a preliminary injunction motion negatively  
7 affected the court's ability to grant the requested relief).

8 Indeed, as to enjoining enforcement of Board Policy 3050 on civility, Plaintiff himself  
9 unduly delayed even before making the instant preliminary injunction request in July 2023. *See*  
10 *Miller for and on behalf of N.L.R.B. v. Cal. Pac. Medic. Ctr.*, 991 F.2d 536, 544 (9th Cir. 1993)  
11 (a plaintiff's "long delay before seeking a preliminary injunction implies a lack of urgency and  
12 irreparable harm"). Here, Plaintiff was accused by a colleague of bullying in September 2021,  
13 and an administrative determination (actually in Plaintiff's favor) issued in February 2022.  
14 (Declaration of Daymon Johnson filed July 20, 2023 [Doc. No. 26-1], ¶¶ 101-03, 105.) He filed  
15 this lawsuit well over a year afterward, claiming there is some type of exigency warranting  
16 preliminary injunctive relief. Soon, another year will have passed after Plaintiff filed this lawsuit  
17 and demanded a preliminary injunction. (Plaintiff may argue this just means he has suffered an  
18 unwarranted chilling effect from Board Policy 3050 this entire time, but this does not account for  
19 the more than a year that passed between the September 2021 bullying complaint that gave rise to  
20 his challenge and Plaintiff's bringing of this lawsuit. Also, even after he brought this lawsuit,  
21 Plaintiff has brought forth no further actual evidence of alleged inhibition in his teaching,  
22 expression, or academic life because of Board Policy 3050.)<sup>2</sup>

23 \_\_\_\_\_  
24 <sup>2</sup> Plaintiff's Motion for Administrative Relief makes some misstatements, and these are addressed  
25 in briefing the District Defendants have already filed with this Court. For example, Professor  
26 Matthew Garrett's termination notice placed in the record shows not that he was terminated  
27 "largely for expressing dissenting political views" (*see* Motion for Administrative Relief filed  
28 May 22, 2024 [Docket No. 85] ("Motion") at 3:1-3), but because of repeated misconduct, false  
complaints, and disruption of activities of Bakersfield College, among other things. (First  
Amended Complaint filed July 6, 2023, Exhibit G (Docket No. 8-8].) As to Trustee Corkins'  
statement about "cattle" (Motion at 2:26-28), the statement is taken out of context and Corkins in  
any event apologized for it. Moreover, Plaintiff's contention that Magistrate Judge Baker has  
"recommended that Plaintiff's motion for a preliminary injunction be granted in *nearly all*  
respects" (*id.* at 4:11-12) (emphasis added) is incorrect. The Magistrate Judge recommended a

1     **III.     CONCLUSION**

2             The standards for an expedited decision on the Motion for Preliminary Injunction are not  
3 met here, and accordingly the instant Motion for Administrative Relief should be denied. This  
4 Court should in any case deny the Motion for Preliminary Injunction not just because it lacks  
5 merit but because no exigency exists and circumstances have changed over time. The District  
6 Defendants also respectfully request that this Court rule on their pending Motion to Dismiss  
7 under Federal Rule of Civil Procedure 12(b)(6), which addresses both the question of standing  
8 and the merits of Plaintiff's claims, and adjudicate all the claims in this lawsuit against Plaintiff.

9  
10     Dated: May 28, 2024

LIEBERT CASSIDY WHITMORE

11  
12             By: /s/ David A. Urban

13             Jesse J. Maddox  
14             David A. Urban  
15             Olga Y. Bryan  
16             Morgan Johnson  
17             Attorneys for Defendants STEVE  
18             WATKIN in his official capacity as  
19             Interim President, Bakersfield College;  
20             et al.

21  
22  
23  
24  
25  
26     \_\_\_\_\_  
27 preliminary injunction of much more limited scope than that Plaintiff sought. Plaintiff sought to  
28 have the preliminary injunction apply to the DEIA regulations on their face (i.e., District-wide  
and even State-wide), and the proposed preliminary injunction applies only to Plaintiff. (*See*  
Plaintiff's Objections to Findings and Recommendation filed November 28, 2023 [Docket No.  
74], at 1, 6-10.)